United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2221. 779

ADRIAN G. WYNKOOP, APPELLANT,

vs.

LOUIS P. SHOEMAKER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 14, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

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ADRIAN G. WYNKOOP, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 13, 1910.

In the Court of Appeals of the District of Columbia.

No. 2221.

ADRIAN G. WYNKOOP, Appellant,
vs.
LOUIS P. SHOEMAKER.

a Supreme Court of the District of Columbia.

At Law. No. 50331.

ADRIAN G. WYNKOOP, Plaintiff,
vs.
LOUIS P. SHOEMAKER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following paperes were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Mar. 11, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50331.

ADRIAN G. WYNKOOP, Plaintiff,
vs.
LOUIS P. SHOEMAKER, Defendant.

The plaintiff sues the defendant for this, to wit: that heretofore, to wit, on the 9th day of August 1907, the said defendant entered into a written contract, under seal, with one Eugene M. Farr, whereby it was, among other things, covenanted and agreed between them in substance as follows, to wit, that the said defendant in consideration of the sum of five hundred dollars ($500.00) received by

him of and from the said Farr, as a deposit and on account of the purchase of a tract of land located in the District of Columbia containing about sixty (60) acres and more particularly known as the Enock Moreland tract and of which one Alexander F. Mathews had, before then, died seized and possessed, contracted to sell to the said Farr subject to the approval of the owner, said tract at and for the sum of eight hundred ($800.00) per acre, to be paid as follows: Ten thousand dollars $10,000.00) in cash, on which the aforesaid five hundred dollars ($500.00) deposit, was to be a credit at the time of the delivery of the Deed and the giving of a Deed of Trust for the residue, which was to be done within thirty or sixty
2 days from the date thereof; and it was further stipulated, that if this were not done within thirty days, a further deposit of five hundred dollars ($500.00) should be made, and the balance of the cash payment was to be made and the Deed of Trust was to be given, in any event, within sixty days from the date of said contract, and that failure on the part of the said Farr to comply with said terms within said time, should cause a forfeiture of said deposit or deposits and they should be retained by the said defendant as an agreed liquidation of damages and the proposed sale should be off and the contract void, and it was specially agreed that time should be considered as the essence of the agreement:

And it was further in said contract agreed that, if the title to said property should not prove to be good and free from encumbrance, the said deposit of five hundred dollars ($500.00) together with any future deposit which might be made should be returned to the said Farr and the contract to sell, should be off and void, without any liability upon the said Shoemaker or those whom he represented: And, thereafter, to wit, on August 24th, 1907, the said Farr, not having then made the first deposit of five hundred dollars ($500.00), received of and from the plaintiff, the sum of one thousand dollars ($1,000.00) which he, the said Farr paid to the said defendant Shoemaker as a deposit on said proposed purchase and which he, the said defendant Shoemaker well knew, he, the said Farr, had received from this plaintiff, and in consideration of which, and with the knowledge and approval of the said Shoemaker, the said Farr was to assign the said contract to the said plaintiff: And on said date
3 last mentioned, to wit, August 24th, 1907, it was agreed and endorsed upon the contract between the said Shoemaker and the said Farr, that the date thereof should, for all purposes, be regarded as August 24th instead of August 9th, 1907, all other conditions of said contract remaining unchanged, and thereupon the said Farr, by formal assignment in writing did, with the knowledge and consent of the said Shoemaker, assign said contract, and the said defendant did deliver the same to the said plaintiff, and thereupon the said defendant Shoemaker became and was bound to have, by the terms of the contract and according to its tenor and effect, the approval of the owner or owners of the property to the contract of sale aforesaid and was further bound that the title to said property was good and free from encumbrance and if he had not the approval of the owners or the title were not good or free

from encumbrance, then and in either event, within sixty days from the said 24th day of August, 1907, he was bound to return the said sum of one thousand dollars ($1,000.00) to the plaintiff.

But the said defendant Shoemaker did not, on the said 24th day of August, 1907, or within sixty days thereafter, have the consent or approval of the owners of the property to and of the terms of the said contract of sale nor was the said property free from encumbrance within said time and thereupon there accrued to and is now in the plaintiff, the right to have of and from the said Shoemaker, the repayment of the said sum of one thousand dollars ($1,000.00) and the said plaintiff demanded of and from the said defendant Shoemaker, the repayment and return to him of said one thousand
4 dollars ($1,000.00) within the period of and at the expiration of said sixty days, to wit, on the 24th day of October, 1907, which the said defendant refused and has ever since refused to do, though often thereto requested by the plaintiff.

Second Count.

The plaintiff sues the defendant for this, to wit: for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them.

The plaintiff claims the sum of one thousand dollars ($1,000.00) with interest thereon from October 24th, 1907, together with the costs of this suit.

MORGAN H. BEACH,
Plaintiff's Attorney.

Bill of Particulars.

Louis P. Shoemaker to A. G. Wynkoop, Dr.

OCTOBER 24, 1907.

To deposit on account of Enock Moreland tract..... $1,000.00

Notice to Plead.

The defendant is to plead hereto on or before the twentieth
5 day *day,* exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

MORGAN H. BEACH,
Plaintiff's Attorney.

6 *Defendant's Pleas to Second Count of Declaration.*

Filed Apr. 3, 1908.

* * * * * * *

The defendant, for pleas to the second count of the declaration filed in the above entitled cause, says:

1. That he did not promise in manner and form as therein alleged.

2. That he is not indebted in manner and form as therein alleged.

LAMBERT & YEATMAN,
RUDOLPH H. YEATMAN,
Attorneys for Defendant.

Defendant's Pleas to the First Count.

Filed Mar. 22, 1909.

* * * * * * *

The defendant, for pleas to the first count of the declaration filed in the above entitled cause, says:

1. That he did not promise in manner and form as therein alleged.

2. That he is not indebted in manner and form as therein alleged.

WILTON J. LAMBERT,
RUDOLPH H. YEATMAN,
Attorneys for Defendant.

7 *Joinder of Issue.*

Filed Mar. 23, 1909.

* * * * * * *

The plaintiff joins issue on the several pleas of the defendant.

MORGAN H. BEACH,
Attorney for Plaintiff.

Memorandum.

March 29, 1910.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *April* 1, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be and hereby is overruled, and judgment on verdict ordered.

Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and re-
8 cover against the plaintiff the cost of his defense, to be taxed by the Clerk, and have execution thereof.

The plaintiff by his attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100).

Memoranda.

April 21, 1910.—Appeal bond approved and filed.

May 5, 1910.—Time to submit Bill of Exceptions extended to June 10, 1910, inclusive.

June 7, 1910.—Time to file record in Appellate Court extended to August 15, 1910, inclusive.

June 10, 1910.—Bill of exceptions submitted.

9 Supreme Court of the District of Columbia.

WEDNESDAY, *July* 20. 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Now comes here the plaintiff by his Attorney and prays the Court to sign, seal and make part of the record, his bill of exceptions taken at the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

Bill of Exceptions.

Filed Jul- 20, 1910.

* * * * * * *

Be it remembered, at the trial of this case before Mr. Justice Wright and a jury on the 28-29 days of March, 1910, the plaintiff to maintain the issue joined introduced in his behalf in evidence, and which was all the evidence, the following that is to say:

1. The last will and testament of Alexander F. Mathews deceased which is in the words and figures following:

I, Alexr. F. Mathews, do make and declare this to be my last Will and Testament in manner and form following:

Item 1st I will and direct that all the estate, personal and
10 mixed, of which I die seized and possessed shall, after the payment of any and all just debts then owing by me, be disposed of and distributed in accordance with the Statutes of the State of West Virginia as *now* in force concerning and regulating the disposition and distribution of the estates of decedents who die intestate.

Item 2nd I hereby authorize and empower my Executors, hereinafter named and appointed, to make sales of my property, both that which I may own severally and solely and that which I may own jointly with others for the payment of debts if necessary for that purpose, or *to* the persons entitled thereto, as beneficiaries of this my will, as provided in Item 1st in order to a proper apportionment and partition between them, or in order, if necessary or desirable, to convert said property or any part or parts thereof into money for the purpose of distribution and apportionment as aforesaid;

And I further authorize and empower my said Executors to execute any and all deeds, contracts or other papers which may be proper or necessary to make perfect, carry out and consummate said sales without having to invoke the aid of any Court to that end.

Item 3rd I hereby authorize and empower my said Executors to execute for and on behalf of my estate any and all notes contracts, agreements, title bonds or other papers which may be proper necessary or convenient for the settling up of my business, the administration of my estate, the executions and carrying out the provisions of this will, and for consummating and carrying out any con-
11 tract, negotiations or agreements which I have made and entered into and which are not fully carried out, consummated and ended at the time of my death—All without invoking or calling for the aid of any Court, and with the same force and effect as if they were acting under the authority and direction of a Court of competent jurisdiction.

Item 4th I will and direct that there shall be no inventory appraisement or sale of my estate or any part thereof, except such sales as my Executors *or* hereinbefore authorized and empowered to make.

Item 5th I hereby appoint and name my sons Mason Mathews, Charles G. Mathews and Henry A. Mathews the Executors of this my Will and I further direct that no security be required of them on their bonds as such executors.

Written and signed wholly with my own hand and sealed by me with my seal this the 22nd day of September 1900.

ALEXR. F. MATHEWS. [SEAL.]

WEST VIRGINIA:

Greenbrier County Court.

CLERK'S OFFICE, *Jan'y 2nd,* 1907.

A paper purporting to be the last will and testament of Alexr. F. Mathews dec'd bearing date on Sept. 22nd, 1900 was on this day produced before Chas. B. Buster Clerk of Greenbrier County Court in his office and there being no subscribing witnesses to said will, John A. Preston, D. C. T. Davis, Jr. and F. Herbert Mays, Gentlemen were duly sworn and each did depose and say that they were well acquainted with the handwriting of the said Testator and that they verily believe that the said will and the signature thereto was
12 wholly written by the Testator's own hand and that the said Alex. F. Mathews at the time of making said will was of sound mind and memory, and capable of making said will, whereupon the said paper writing is admitted to record as the last will and testament of Alex. F. Mathews Dec'd.

A Copy,
Teste:

C. B. BUSTER, *Clerk.*

WEST VIRGINIA:

At a Regular Term of the County Court for the County of Greenbrier, Held at the Court House Thereof, on Monday, the 7th Day of January, 1907.

Present: Jno. D. Arbuckle, President the Co. Ct.; J. W. McDowell and J. M. Argabrite, Com'rs.

The orders entered by the Clerk of this Court in vacation since the last regular term thereof having been inspected by the Court are Confirmed.

J. C. ARBUCKLE, *Pres.*

WEST VIRGINIA,
Greenbrier County, ss:

I, Jno. S. Crawford Clerk of the County Court in and for the County and State aforesaid, it being a Court of Record with a seal do hereby certify that the foregoing writing is a true and exact copy of the last Will and Testament of Alexr. F. Mathews Deceased, together with the order of thr Clerk Admitting said Will to probate, in vacation and also the order of the County Court confirming the orders entered by the Clerk in vacation, as found of record in my said office.

Given under my hand and seal of the County Court of the County and State aforesaid at the Court House thereof on this the 2nd day of March 1910.

13 [SEAL.] JNO. S. CRAWFORD,
Clerk of the County Court in and for
Greenbrier County, West Virginia.

WEST VIRGINIA,
Greenbrier County, ss:

I, J. W. McDowell President of the County Court in and for the County and State aforesaid do hereby certify that Jno. S. Crawford whose name is signed to the foregoing certificate is the Clerk of Said Court duly elected and qualified and all his acts as such officer is entitled to full faith and credit, and the foregoing copy is a true copy of said will of Alexr. F. Mathews deceased together with the order admitting said will to probate and order confirming the action of the Clerk in vacation, as found recorded in the Clerk's Office of Greenbrier County Court. Given under my hand and seal of the County Court at the Court House thereof on this the 3rd day of March 1910.

[SEAL.]

J. W. McDOWELL,
President of the County Court in and for the County of Greenbrier and State of West Virginia.

WEST VIRGINIA,
Greenbrier County, ss:

I, Jno. S. Crawford, Clerk of the County Court in and for the County and State aforesaid do hereby certify that J. W. McDowell who signed the foregoing certificate is the President of the County Court in and for the County and State aforesaid, duly elected and qualified, and all his acts as such officer are entitled to full faith and credit.

14 Given under my hand and seal of the County Court in and for the County and state aforesaid, at the Court House thereof on this the 3rd day of March 1910.

[SEAL.]

JNO. S. CRAWFORD,
Clerk of County Court in and for the County of Greenbrier and State of West Virginia.

2. And thereafter introduced in evidence the following contract and endorsements thereon the execution whereof was admitted by the defendant which contract is in the words and figures following:

Noted at Top of Page 1 *of Contract.*

Because of unavoidable delay in making the deposit required to be made under this contract until August 24th, 1907, it is hereby agreed and understood that the date thereof shall be for all purposes regarded as being August 24th instead of Aug. 9th 1907, all other conditions of said contract to remain unchanged. Given under our hands and seals at Wash-. D. C., this 24th day of August 1907.

LOUIS P. SHOEMAKER,
Agent for Mathews' Est.
EUGENE M. FARR.

WASHINGTON, D. C., *August* 9, 1907.

Received at Washington, D. C., August Ninth, Nineteen*th* Hundred and Seven, of Eugene M. Farr, the sum of Five Hundred ($500.00) Dollars the same being a Deposit, and on account of the purchase of a tract of land, located in the District of Columbia, containing about Sixty Acres of land, and fronting on Rock
15 Creek Ford Road, being more particularly known as the Enoch Moreland tract*m*, purchased several years ago by Judge Alexander F. Mathews, which tract of land I have contracted to sell, and do hereby contract to sell, subject to the approval of the owner, at and for the sum or price of Eight Hundred ($800.00) Dollars per acre.

To be paid for as follows: Ten Thousand ($10,000.) Dollars in cash (of which the five hundred dollars now paid, shall be a part), at the time of the delivery of the Deed and giving of the Deed of Trust which shall be within thirty or sixty days from this date; if it has not been done within thirty days, a further deposit of Five Hundred ($500.00) Dollars shall be made, and the balance of the cash payment shall be paid and Deed of Trust given in any event, within sixty days from this date and the entire transaction closed as herein stipulated.

Failure on the part of the said Eugene M. Farr, to comply as herein stated, within said time, shall cause a forfeiture of the said sum or sums, and they shall be retained by me as an agreed liquidation of damages, and this proposed sale shall be off and receipt void; time being hereby made of the essence of this agreement.

If the sale is consummated by the payment of the sums stipulated to be paid at the time specified, a Deed of said property of the usual special warranty form, will be given to the said Eugene M. Farr, or his assigns, and a Deed of Trust accepted; to be filed and recorded at the same time in the Office of the Recorder of Deeds for the District of Columbia. The Deed of Trust shall be of the usual form, to be prepared by me and satisfactory to me in every
16 respect, and the trustees therein are to be named by me. It shall secure the balance

Noted at Bottom of Page 1 *of Contract.*

Received of Eugene M. Farr, his order for one thousand ($1,000.00) dollars on McLachlen & Company for collection and subject to payment to me on Monday August 26th, 1907 as the deposit in this contract—if the money is not paid on this order on Monday August 26th 1907, this receipt shall be void and of no effect whatever as affecting the validity of said contract.

Approved:

MATHEWS EST.,
LOUIS P. SHOEMAKER, *Agt.*
EUGENE M. FARR.

of the purchase money after the payment of Ten Thousand ($10,000.00) Dollars, to be represented by three notes of equal

amount, payable at or before one, two or three years with interest from date hereof, at the rate of five (5%) per cent per annum, payable semi-annually. The said Deed of Trust shall provide for the sale of the said land in case of default in the payment of any one of said notes or any installment of interest thereon.

The said Deed of Trust shall contain a provision for the release of any of the property described therein, provided a subdivision according to the Street Extension Plan shall have been made and recorded, upon the payment of three (.03) cents per square foot, in cash, for such ground as may be released at the time of the delivery of such Deed of Release, but no property shall be released upon the payment of a sum less than Five Hundred ($500.00)
Dollars, at any one time, upon the making of such payment
17 and delivery of the Deed of Release, Credit of the amount
paid shall be made upon the back of the note first maturing, and it shall be regarded as a partial payment thereof, but none of the said property shall be released unless it has been so subdivided.

Each and every one of the said Deeds of Release shall be prepared by me at the expense of the said Eugene M. Farr, or his assigns, which expense shall be the sum of Five ($5.00) Dollars and the notary fees.

The said property shall be accurately surveyed and plotted by Mr. D. F. Taylor, Civil Engineer of the District of Columbia, and provided it shall be approved by the Surveyor of the District of Columbia, at the expense of the said Eugene M. Farr, within the time herein prescribed for settlement. All title papers, conveyancing, recording, and notary fees shall be at the cost of the said purchaser, and the said title shall be examined by one of the Title Companies of the District of Columbia, and such title papers shall remain in my possession until the debt secured by the Deed of Trust shall be paid in full.

If the title to said property should not prove to be good and free from encumbrance, the deposit now made, together with any future deposits which may be made, shall be returned to said Eugene M. Farr, and this agreement to sell shall be off and receipt void, without any liability having accrued upon me or those whom I represent. All taxes upon said property, rent of house and insurance shall be proportioned and paid by the present owners to date of this
paper.
18 If it is desired by the said Eugene M. Farr, or his assigns,
to make a subdivision after recording the said Deed of Trust, and dedicate the Streets in accordance with the Street Extension Plan of the District of Columbia, the present owners and holders of said Deed of Trust, hereby agree to unite in signing the map of subdivision and dedication, such subdivision if made, shall show the Streets dedicated up to and connecting with the tract on the East or Northeast of the land hereby contracted to be sold, and at the present time, owned by the parties who own the land hereby contracted to be sold, so that the Streets may be continued and carried through the adjoining property if it should — desired to do so.

The said property is now under lease with Augustus Terry, by

agreement dated March 14th, 1907, for one year, and there is a provision in said lease to the effect, that if the said property is sold during the year, the said Terry shall be entitled to a three months' notice.

And this receipt is issued subject to said lease with said Terry, and the said Farr or his assigns, hereby agree to take subject to all the rights of said Terry.

Given under my hand and seal this 9th day of August, 1907.

LOUIS P. SHOEMAKER,
Ag't for Mathews Est. [SEAL.]

I, Eugene M. Farr, of the District of Columbia, do hereby for myself or assigns, accept the conditions of this contract. Given under my hand and seal this 9th day of August 1907.

EUGENE M. FARR. [SEAL.]

19 We the undersigned representatives of the Estate of Alexander F. Mathews, do hereby consent to and approve of the provisions in the above receipt signed by our agent Louis P. Shoemaker. Given under our hands and seals this 13th day of August 1907.

MASON MATHEWS, *Ex'c'r.* [SEAL.]
C. G. MATHEWS, *Ex'c'r.* [SEAL.]
HENRY A. MATHEWS, *Ex'c'r.* [SEAL.]

3. And thereafter introduced in evidence the following assignment of the said contract to the plaintiff which is in the words and figures following:

WASHINGTON, D. C., *Aug. 10th,* 1907.

Know all men by these presents that I, Eugene M. Farr, for and in consideration of the sum of ten ($10.00) Dollars, lawful money of the United States, receipt whereof is hereby acknowledged before the signing and sealing hereof, do hereby set over, transfer and assign unto A. G. Wynkoop all my right, title and interest in and to a certain contract dated August 9th, 1907, by and between myself and Louis P. Shoemaker, approved by the Owners for the purchase by me of a tract of land in the District of Columbia, containing Sixty (60) acres more or less, fronting on the Rock Creek Ford Road, known as the Enoch C. Moreland tract, purchased several years ago by Judge Alexander F. Mathews.

And I do hereby direct, That the property so as aforesaid contracted to be purchased by me, shall be conveyed to A. G. Wynkoop upon the same terms and conditions as in said contract set forth.

Witness my hand and seal this 23rd day of August, 1907.

20 EUGENE M. FARR. [SEAL.]

Witness:

——— ———.

Accepted:

A. G. WYNKOOP. [SEAL.]

4. And thereafter being sworn as a witness in his own behalf, he testified as follows:

Direct examination:

"I live in Charles Town, West Virginia, and am in the real estate business, and an attorney at law; I first met the defendant August 24, 1907 in his office where I was introduced to him by Eugene M. Farr and where I went to pay defendant one thousand dollars on this contract which I did through Mr. Farr and I received the contract from the defendant; Farr gave me a copy of the contract to start with; at the defendant's office Farr told him I wanted to pay the whole thousand dollars instead of $500. which he had paid me the day before and asked Mr. Shoemaker to phone to McLachlen and Company to see if it was all right about the thousand dollars, which he did and McLachlen phoned back that it had been O. K.ed at Charles Town by the bank and that the money would be paid; defendant then told me "This contract which I have given you here has been very skilfully prepared by one of the ablest lawyers in the City of Washington. It means exactly what it says; it is signed by the executors of Judge Mathews' estate and by myself, and if for any reason at the end of sixty days a good deed cannot be made to you, I will pay you your money back": the note at the top of the first page of the contract was made by the defendant
21 at my request, because two weeks of the time had expired and I told defendant that six weeks would be a very short time to operate; he told me he would phone today to the executors if they approve what has been done; the assignment from Farr to me was attached to the contract and the defendant saw it and said it was a very proper thing to do; defendant phoned to Lewisburg and the executors replied from Lewisburg that they approved of this paper; the words "Received of Eugene M. Farr his order for one thousand dollars ($1,000.00) on McLachlen and Company for collection" et seq: at the bottom of the first page of the contract were written there on the same day, the 24th of August; the assignment from Farr to me was signed by Farr in his office on August 23, 1907 and was attached to the contract and given me at the same time in the defendant's office; I then returned to Charles Town and tried to organize a company to put the lots on the market; I stated to defendant about three or four weeks, maybe longer, before the option expired, in his office that a deed could not be made within sixty days, and I had before that time attempted to interest others, real estate agents, in this property; at this visit I demanded back my money and served the following paper upon him as stating the grounds of objection to the title:

Judge Matthews' Executors or *the Enoch Moreland Tract,* 59 85/100 *Acres.*

Before you could get a good title to this property it would be necessary for you to have the regular Court proceedings in the Dis-

trict instituted by the heirs, in order to complete the record,
22 by reason of the death of Capt. Matthews, the Title Company will only certify, that the property would be subject to the debts of the estate, and that the deeds are good according to the recitals.

This kind of a Title would be unsatisfactory to the average buyer. In order that a good title be given it would be necessary to institute proceedings here in the Probate Court, and await the regular time, which I think is thirteen months from the death of the Testator before the heirs can give a good title to the property, as Capt. Matthews' "Will" only having two witnesses, will not convey property in the District of Columbia.

Defendant refused to refund and said he would have to consult with the executors of the Matthews estate; afterwards I went to him another time and told him I could not get any of the real estate agents in town to take the option and I came to get my money back; I last visited the defendant with my counsel Colonel Brown of Charles Town, West Virginia, on October 24, 1907, which was the day the option expired; the defendant sent for his attorney Mr. Lambert; Colonel Brown demanded my money back saying the case would have to go through court and would take at least a year and Mr. Lambert said he thought he could get it through in three or four or five days; the defendant refused to refund and said he would have to get permission from the Matthews executors, if he paid it all; I told him that I had a statement from them the- he could do as he pleased with it, that it was for him to act, not
23 for them. Several days afterwards I came to Washington and I told him I had received a letter from the Mathews executors; they said they had not received any of the thousand dollars——

At this point the witness was interrupted by objection from counsel for the defendant, and the following occurred:

Mr. LAMBERT: One moment, I object to that.

Mr. BEACH: What is the ground?

The COURT: What is the relevancy of this?

Mr. BEACH: I think it might be relevant in this sense; evidently there is to be a question about the agency of Mr. Shoemaker and his authority to act and it appears here in depositions that of this thousand dollars not a penny got to the Mathews' executors.

The COURT: The objection is sustained.

Mr. BEACH: I note an exception.

And the witness testified as follows under cross-examination:

I met Farr for the first time on the 23rd of August, 1907, at his office in Washington which was the day I arranged for the assignment from him to me and the day I purchased this contract; I signed the assignment and accepted the contract from Farr in his office that day; I had not met Farr and had nothing to do with this property as early as August 10; I first saw the contract in his office the 23rd day of August; I think Stallings was there at the

time; I went over this contract when I bought it from Farr; the next day, August 24th, I went with Farr to Shoemaker's office; I did not know Judge Mathews nor that he was dead; when I saw the words "executors" in the contract I knew he was dead;
24 this was on the 24th of August; Shoemaker got the money then; I bought it from Farr on the 23rd; it was about nine or ten A. M. when Farr and I went to Shoemaker's office on the 24th; I signed nothing there; Farr said he had given Shoemaker a check for the thousand dollars on the 23rd; he told me he had done it but he had not done it; he put it in McLachlen's bank and only paid him five hundred dollars ($500.00) on it; on the 24th we went to Mr. Shoemaker who told Farr he must pay the whole thousand dollars; he would not risk it unless he paid the whole thousand dollars on the option and Farr gave an order on McLachlen, and McLachlen phoned up he would pay Shoemaker and Shoemaker said it was all right; I insisted that Farr should pay the whole thousand dollars down instead of making two payments of five hundred dollars ($500.00) each, and that Farr should give me the benefit of sixty days from that date; the contract and assignment I had with me and the whole thing was perfected in Shoemaker's office on that occasion; I returned home that day and came back several days or a week afterwards; I intended to purchase the property with other parties; I was going to join in; I expected to carry the deal through with the aid of other people who had agreed to come in with me; I did not have the money to pay it all, forty-eight thousand dollars ($48,000.00); four of us agreed to take it.

And thereupon and at this point the following occurred:

Question by Mr. LAMBERT: Where are those people located that you said were expecting to take the proposition up?

Mr. BEACH: I object, as not responsive to the direct ex-
25 amination and not material to any issue.

The COURT: The objection is overruled.

Mr. BEACH: I note an exception.

And thereupon the witness answered and continued to testify under cross-examination as follows:

Stallings who lived here in Washington; he was one of them; and Farr was another one, and Davenport was the other one.

None of them lived in Baltimore.

And at this point the following occurred:

Question by Mr. LAMBERT: None of them lived in Baltimore?

Did you not have an arrangement to make a deal or sell this property to some Baltimore people?

Mr. BEACH: Object on the same grounds.

The COURT: The objection is overruled.

Mr. BEACH: The same exception.

And thereupon the witness answering the question and continuing to testify said in substance; There was a Mr. Boelmer in Baltimore who about a week before the contract expired wrote to me if I did not have some property down here.

I had expected purchasers in Baltimore; I do not remember the next time I came to Washington; I came to Washington after the

24th of August, perhaps two or three weeks; I saw Mr. Shoemaker on this visit and talked to him about the lease and about the tenant on the property whom Mr. Shoemaker agreed to notify to quit; the next time I came down to see Reginald W. Beall who had written me a letter that surprised me so about the title; I do not remember the date; three or four weeks before the contract expired; I
26 saw Shoemaker on that occasion and demanded my money back; that, I think, was the first time I demanded my money back; Beall had offered me fifty-two thousand dollars ($52,000.00); I took the contract and went to see Rozier Dulaney; I think this was the second time I came back to Washington after the 24th of August; I came down with Brown, the lawyer on the fourth time; it was the second time that I came down to see about the lease; the occasion of my coming down with Brown was to see Shoemaker; I did not bring Brown down that day to confer with some people from Baltimore to whom I had expected to turn the property over; it was later that Boelmer was over here, on the 24th, the day the option expired and he said he could get a man to take it in two or three days; I did have a conference with Baltimore people a few days after that, to whom I expected to turn over the property if they would buy it; and they said they could not deal for a week or ten days; after seeing the Baltimore people I called with Brown on Shoemaker; that, I think, was the first time Brown called on Shoemaker; that was the occasion I spoke of when the title was discussed; I took away the contract and assignment on August 24th; when I came in and Mr. Farr paid this $1,000. I did not leave one with Shoemaker; I think he had a copy and Farr had another copy on his desk when I left; as nearly as I can fix the date of my first objecting to Shoemaker about the title was October 1st; I gave him the little slip in evidence, not signed later, about two weeks before the time was up; I had my copy of the contract all the time; and so did Shoemaker; the conference with the Baltimore parties was the day the contract ended; this letter is signed by me and I wrote it to Shoemaker.

And thereupon the defendant offered in evidence the let-
27 ter in question being from the plaintiff to the defendant and dated October 11, 1907, to the introduction of which in evidence the plaintiff by counsel objected as not material to the issue joined, but the court overruled such objection and permitted the said letter to be read in evidence, to which the plaintiff by counsel then and there and before the same was read to the jury excepted; and said letter is as follows:

Mr. Louis P. Shoemaker, Washington, D. C.

DEAR SIR: Please attach the enclosed copy of assignment of the 60 acre tract of land from Mr. Farr to myself to *your copy* of our *agreement* as I am about selling my interests to another party.

Kindly sign the enclosed note to Messrs. Moore & Hill, and mail to them, as they have been notified by some one that I have no interest in the property.

Most truly yours,

A. G. WYNKOOP.

And the plaintiff continued to testify under cross-examination as follows:

The next time I called on the defendant was a week or ten days after October 24, 1907; I wrote to him this letter of October 25, 1907.

And thereupon the defendant offered said letter in evidence to which the plaintiff by counsel objected as immaterial to the issue joined, and defendant's counsel stated that his object was to show the plaintiff "had no object in this matter except to try to make a profit in dealing with other parties in Baltimore in reference
28 to the proposition and that they failed to materialize, or come to the point, and that therefore he simply over his own signature, confessed that to be the situation, and that there was nothing about the title at all," the court overruled said objection, to which plaintiff duly excepted, and permitted the same to be read in evidence to the jury and it is as follows:

CHARLES TOWN, JEFFERSON CO., W. VA.,
Oct. 25th, 1907.

Mr. L. P. Shoemaker, Washington, D. C.

DEAR MR. SHOEMAKER: As you expressed a desire that I should not lose my man, and that you were quite anxious to sell the 60 acre tract", that evening I wrote to my Baltimore man, Mr. Samuel Bealmear 116 Law Building. "My party tells me if I can do anything with the 60 acre tract inside of 10 days to let him know," so you might possibly yet interest your man, and we succeed in selling. "Now my terms were to him $52,000, ¼ *cash,* balance in 1, 2 & 3 years at 5 per ct. interest with a 5 per ct. commission to him if he made a sale and to let me hear from him if he could do anything."

Last night he wrote me, "He would at once go to work on the matter with Mr. Charles A. Shields, of 1405 14th St. N. W., Washington, D. C., his partner in the matter, and see what he could do—now I have said nothing to Mr. Bealmear about the *title* nor he to me—it might be his man might not object to it.

29 Now I have done with this with no intention of asking you for an extension of the 60 day option, that ran out last night and which I *do not* ask to be extended, but to show you my willingness to do all I can to aid you in the sale of the property, and if you do *not approve* of it, or have *optioned* it to some one else—please *wire* me *at once,* and I will *wire* Mr. Bealmear *not* to longer offer it.

Should anything come out of it, you can give me such part of the profit you see fit for I have spent several hundred dollars trying to dispose of it. Please let me hear from you.

Most truly yours,

A. G. WYNKOOP.

And the plaintiff continued to testify under cross-examination as follows:

I wrote that letter from Charles Town the day after I had called

on Shoemaker in Washington; I did not then ask for any extension; he refused to give me any extension; there is his letter showing he refused; the letter shown me of October 26 may be in answer to my letter to him of October 25th; I cannot say positively, but there was another letter, too, about the same time in which he positively said he would not give me ten days or any time, the option had expired;

And thereupon the witness being shown a letter to him from the defendant dated October 29, 1907, identified the same as that referred to by him and it was offered to — read in evidence, and is as follows:

30 WASHINGTON, D. C., *October* 29, 1907.

Mr. A. G. Wynkoop, Charles Town, W. Virginia.

DEAR SIR: I received your letter this morning and in reply would say that the time has expired within which you were to purchase the property and therefore under the terms of the contract, as I stated to you some days before its expiration, and as specified therein, the amount is to be retained by me as an agreed liquidation of damages, and of course I never expected or intended to vary the terms of this agreement, and therefore feel that I am under no moral or legal obligation to comply with your request to return the money which was put up in good faith under this agreement. Your position with reference to the title is untenable because the title to the property is good, and the property free from incumbrances.

Very respectfully,

LOUIS P. SHOEMAKER.

And the witness continued to testify under cross-examination as follows:

I wrote to Shoemaker saying I did not want any extension, and I turned the Boelmear matter over to him; told him to deal with the party and if he saw fit to give me any profits he could; I did not claim any extension, and all I wanted was my money back; I never asked for any extension; the only extension that was mentioned was in Brown's presence, when Shoemaker said "Don't let your
31 man get away; a few days will not make any difference" he said that and denied it afterwards in that letter and said "I never intended to give you a day's extension"; he did state at that time not to let my man get away and that he would give further time, and then I wrote him that letter from Charles Town after consulting Mr. Brown, and I wrote him several times afterwards, but I never asked for any extension. The letter shown me of October 26th is one of the letters I received from Mr. Shoemaker in answer to my letter to him of October 25th, and there was another letter, too, which followed in a day or two.

And thereupon the defendant offered said letter in evidence, which plaintiff objected as immaterial, and the court overruling the same, duly excepted; which letter is as follows:

WASHINGTON, D. C., *October* 26, 1907.

Mr. A. G. Wynkoop, Charles Town, W. Virginia.

DEAR SIR: Your favor came duly to hand and contents noted. While I realize that the option held by you has expired you are right in your conclusion that I desire to have a sale effected, and naturally would prefer that you carry the same through, in view of the labor and expense to which you have been put.

While I, of course, waive no rights which have accrued to me in connection with the expired option, I assure you my clients stand ready to convey a good and unencumbered title to the property so long as it is for sale, to any purchaser you may pro-
32 duce upon the terms already considered between us provided I have not made other disposition of the property before offer is received from you, and so long as my principles do not change the price and terms of sale.

Very respectfully,

LOUIS P. SHOEMAKER.

And the plaintiff continued to testify under cross examination as follows:

I received a letter from defendant dated October 21, 1907, which was about the time I left the typewritten and unsigned memorandum, it may have been before or after that; it was prior, however, to my visit with Brown to Shoemaker.

And thereupon the defendant offered and read in evidence the following letter.

WASHINGTON, D. C., *October* 21, 1907.

Mr. W. G. Wynkoop, Charles Town, W. Virginia.

DEAR MR. WYNKOOP: I have carefully considered the Matthews matter since you were here a few days ago. Assuming that the will has but two witnesses, under the Code of the District of Columbia it is a valid and subsistent will to pass real estate. Even if the will itself is not sufficient for this purpose, all the heirs of Mr. Alexander F. Matthews are adults, competent to sign a deed and ready to do so, upon the compliance with the provisions of the contract made with Mr. Farr, and assigned as I have been advised by you. With reference to the other point which was
33 made in a typewritten paper which you left with me, and not signed by any one, I would say that Mr. Matthews was a wealthy man and owned a great deal of real estate, all of it, so far as the District of Columbia is concerned, was unencumbered, and I believe all formal matters connected with administration have been attended to at the place of his last domicile. In addition were it necessary, I am sure there would be no difficulty in giving a bond to indemnify the title company, and secure a guarantee certificate of title which is sometimes issued by the Title Companies, or I can go into the court by a very short proceedings and the court will direct the conveyance to be made to you or to any person entitled to it, free from any encumbrance; in other words, there is no difficulty in giving you a deed conveying a good title to the property

free from encumbrance, if you are prepared to comply with your part of the contract, and it is my purpose by this letter to give you notice of this fact and request that you will promptly advise me in whose name you desire the deed to be made.

Very respectfully,

LOUIS P. SHOEMAKER.

And the plaintiff continued to testify under cross examination as follows:

I never advised the defendant to whom the deed was to be made; I did not want any deed; I told him his deed was not any acount; I did not tender him the $10,000 to be paid in cash within the
34 time specified, sixty days; I refused to accept his deed, such a deed as he offered to give, signed by the executors; he never offered me any deed from the heirs; he may have after the sixty days had expired; he wrote this letter of October 21, in which he said "There is no difficulty in giving you a deed conveying good title to the property, free from incumbrance, if you are prepared to comply with your part of the contract"; I think I answered that, I think I answered most everything he sent to me; I executed no notes or deeds of trust for the deferred payments; I made no tender of the balance due, nor compliance with the terms of this contract nor did I demand a deed.

And on redirect examination the witness continued:

I demanded back my money from the defendant when I called on him with my attorney Brown, and also had demanded it before that time.

And thereupon the plaintiff by counsel offered in evidence the followings letters, admitted to have been written by him and received by the defendant for the purpose of showing that there had been no request for an extension of time under the contract nor any waiver by the plaintiff of his right to have returned to him the one thousand dollars ($1,000.00) and to rebut the argument of the defendant that the plaintiff by his letter to the defendant of October 25, "Had no object in this matter except to try to make a profit in dealing with other parties in Baltimore in reference to the proposition and that they failed to materalize or come to the point, and that therefore he simply, over his own signature confessed that to be the situation and that there is nothing about the title at
35 all"; but to the offer of each and all of said letter- the defendant by his counsel objected, which objections were sustained and to which rulings of the court in excluding each and all of said letters plaintiff by counsel then and there duly excepted, and said letters are as follows:

CHARLES TOWN, JEFFERSON CO., W. VA.,
October 26th, 1907.

Mr. L. P. Shoemaker, Baltimore, Md.

DEAR SIR: If you have heard favorably from Mr. Matthews, kindly aid me by sending your check for the $1000 by the 29th, as

my note for that amount becomes due at our bank on that day, and I will be very much embarrassed if I do not receive your check.

I sent you a special delivery letter stating correspondence I have had with Mr. Samuel Bealmear of Baltimore, and if I can further aid in the matter kindly advise me.

Most truly yours, A. G. WYNKOOP.

CHARLES TOWN, JEFFERSON CO., W. VA.,
October 28*th*, 1907.

Mr. Louis P. Shoemaker, Washington, D. C.

DEAR SIR: After leaving your office on the evening of the 23rd I parted with my counsel Co. Brown, and have not seem him
36 until this morning, when I mentioned to him what I had written Mr. Bealmear and yourself. He did not approve of it for the reason as he states the title being faulty, and we having knowledge of it, should Mr. Bealmear sell we would have the same difficulty to meet and I might be put to much litigation and expense, consequently I feel perhaps I had better tell Mr. Bealmear the true condition of the matter, so he will understand what the situation is, and what will have to be done to get a marketable title.

Now I have written to you and asked you to return the money I have paid, as I need it, and I want it at once, as I have incurred obligations in the matter, I am obliged to meet, so I am in a position that I must know what you are going to do about its return or whether I will have to sue for its recovery, what I do not want to do unless I have to.

Respectfully yours, A. G. WYNKOOP.

CHARLES TOWN, JEFFERSON CO., W. VA.,
October 30, 1907.

Mr. L. P. Shoemaker, Washington, D. C.

DEAR SIR: I have several times requested the return of the money I paid you in the 60 day option, and have recently been advised that you knew of the opinion of the Title Company in the sale of the Chopin house property belonging to Judge Alexander
37 Matthews Estate, prior to giving me this option, and that said Title Company would only certify, that the property woud be subject to the debts of the estate, and that the deeds are good according to the recitals, and that a part of said recitals was a copy of the will of Judge Matthews, deceased, to which the names of no witnesses were attached as the law required and which could not be probated in the District of Columbia, and could only be remedied by regular proceedings instituted by the heirs in the Probate Court, and I have been advised the regular time for completion of said proceedings is 13 months, now with this incumbrance now upon the property after the expiration of the 60 days' option, which option states, "if the Title to said property should not prove to be good and free from encumbrance the deposit now made together with any future deposits which may be made shall be returned and

this agreement to sell shall be off and receipt void." Now under these circumstances what right have you to withhold my money?

I consider myself specially damaged in this matter, as several reputable real estate agents of your city have advised me they considered the title to be faulty to this property.

Most respectfully yours,

A. G. WYNKOOP.

And thereupon the witness stood aside and was excused:

38 5. And thereupon the plaintiff by his counsel offered in evidence the record in the equity case of Mathews et al. against Mathews et al. in the Supreme Court of the District of Columbia, number 27,496, wherein Henry A. Mathews, Laura G. Mathews, Mason Mathews, and Jane M. Mathews his wife were complainants, and were represented by Wilton J. Lambert, as attorney, and Charles G. Mathews, and Harriet B. Mathews, his wife, and Eliza P. Mathews, were defendants, being a suit between the heirs at law and widow of Alexander F. Mathews, deceased, instituted December 2, 1907, for the partition by sale of real estate in the District of Columbia whereof he died seized, among his heirs at law, and of which the property described in the contract in evidence was a part and an offer to purchase which was made by the defendant Shoemaker and was accepted by a decree entered therein on the 24th day of April, 1908, for the purpose of showing the death of Alexander F. Mathews and the devolution of title and who were the owners of the property in question and of showing further the necessity for equity proceedings to effect a sale and the time necessarily consumed thereby, to all of which the defendant by counsel objected, whereupon the following occurred:

The COURT: Was the plaintiff a party to that proceeding?

Mr. BEACH: No.

The COURT: The objection is sustained.

To which ruling of the court plaintiff by his counsel then and there duly excepted.

6. And thereupon the deposition of FORREST W. BROWN was read by counsel for the plaintiff, which deposition was duly taken and returned and filed and published in this case, and is in sub-
39 stance as follows: that he resides in Charlestown, West Virginia, is a member of the bar and knows the plaintiff, Wynkoop; he met Mr. Shoemaker at his office once in Washington; he was consulted by Mr. Wynkoop as to the contract in this case and went to Washington to meet some parties from Baltimore about a sale of this property at Wynkoop's request; he met those parties in Washington and they indicated their intention to purchase, but some of the parties involved were either sick or absent and could not get a meeting with Mr. Wynkoop until the following week. Finding the date of the option would expire in a day of two, the next day he advised Mr. Wynkoop that if the latter wanted to deal with those parties, he, Wynkoop, would have to get an extension of the option or make some arrangement about it of some kind.

Not being acquainted with the laws of the District of Columbia at that time as to the sale of real estate belonging to a deceased person, whose estate had not been administered, he sought information and was informed after making inquiries, that Alexander Mathews was dead and was a resident of Lewisberg, West Virginia, and had left a holographic will, that such a will could not be probated in the District of Columbia to pass real estate therein; he was also informed that the title to said property would not be accepted as marketable unless there were some kind of proceedings to administer the estate in the District of Columbia. Having received this information, he went with Mr. Wynkoop to Mr. Shoemaker's office and told Shoemaker that at Mr. Wynkoop's request, he came to
Washington to meet some Baltimore parties who seemed anx-
40 ious to buy the property; that they had informed Wynkoop
in his presence that if Wynkoop could meet them in Washington the following week, they thought they could arrange the matter; witness then informed Shoemaker that he found the option would expire shortly; that he found that this land belonged to Major Mathews, who had died, leaving a holographic will; that the will could not be probated in the District of Columbia, so as to pass title to real estate; that the laws required there should be administration of the estate of the deceased to protect a purchaser of real estate and that the title contracted for was not such as would be marketable, from the information witness received. Witness then asked Shoemaker to refund to Mr. Wynkoop the money paid by the latter for the option. Shoemaker expressed some surprise at that condition of affairs and to the best recollection of witness, he seemed to be unadvised as to the character of the will of Major Matthews and, also, as to whether it could be probated or not; Shoemaker said that he represented the executors of the Mathews estate, and that he could not refund the money without conferring with them, nor take any action in the matter; witness thinks Shoemaker stated that if it was necessary he would try to get a renewal of the option either then or subsequently. On the same day Mr. Lambert, Mr. Shoemaker's attorney, was called in. Witness discussed the matter with Mr. Lambert, but the latter did not know that Mr. Mathews left a will or what the condition of the estate was. Mr. Lambert however, stated that it was his opinion a partition proceeding could be instituted or a proceeding in equity could be consummated in a short time. Shoemaker declined to return the
41 money to Wynkoop. Witness made an investigation of the
land of the District of Columbia, and gave Mr. Wynkoop his opinion on that law, which was conveyed to Mr. Shoemaker. Witness made an investigation as to how safe a purchaser would be in buying a piece of property under a contract of this kind, signed by the executors and as far as he could learn, it did not seem that such could be a marketable title.

On cross examination he stated that he has never been able to convince himself exactly what the law in the District of Columbia is touching this particular subject; his only information was from business men that would not accept it as a marketable title. His in-

vestigation was confined to real estate men but he afterwards talked with lawyers in the District of Columbia. He does not know what the law is.

7. Thereupon, CONRAD SYME testified in behalf of the plaintiff that he was a member of the bar of the Supreme Court of the District of Columbia and was acquainted with the late Alexander F. Mathews at his home in Lewisburg, West Virginia, which was also the birth place and former home of the witness; that Alexander F. Matthews died in December, 1906, and left surviving him a widow Laura A. Mathews, three sons, Mason M. Mathews, Charles G. Matthews and Henry A. Matthews, of whom Mason and Charles are married and a daughter, Eliza Pattan Matthews who is unmarried and that they were all of age on August 1, 1907 and capable of executing a valid deed or contract.

And thereupon the witness stood aside and was excused.

8. And thereupon WILLIAM E. EDMONSTON, a witness produced on behalf of the plaintiff, testified that he was the President
42 of the Real Estate Title Insurance Company and of the Columbia Title Insurance Company of Washington, D. C. and that his specialty in the practice of law was the examination of titles and conveyancing. And to him was put the following question by plaintiff's counsel.

Q. Do not answer this question until there is opportunity to object. In the case at bar we have a decedent dying and leaving, at the time of his death, in West Virginia, a holographic will, and appointing three sons as his executors with power of sale. He died seized of realty in the District of Columbia. I want to ask you, as President of these companies, and as a specialist in conveyancing, whether or not, in your opinion, a good title could be made by a conveyance from those executors, under that holographic will, within six months after the death of the ancestor, of lands lying in the District of Columbia?

To which question the defendant, by his counsel objected and the objection was sustained, to which ruling of the court so sustaining said objection the plaintiff duly excepted and propounded the following question:

Q. I want to ask you, Mr. Edmonston, as President of the title company, and as an expert in conveyancing, whether or not the title company would, within six months after the death of the party who died seized of property within the District of Columbia, pass a title where the heirs at law conveyed, and whether or not, in your certificate, that property would be considered subject to the ancestor's debts?

To which question an objection was made by defendant through counsel and sustained by the court and exception thereto duly taken by the plaintiff's counsel.

9. And thereupon FREDERICK MCKEE testified in the plain-
43 tiff's behalf that he was a member of the local bar and connected with one of the title companies of Washington and was a specialist in the title examination in the District of Columbia, and to him was propounded by counsel for plaintiff, the following question:

Q. Do not answer this question until objection can be made to it. Would your title company pass as a good title lands attempted to be conveyed by the heirs at law of a non-resident intestate, of property here in the District of Columbia, within six months after his decease, in the absence of either local administration or of some judicial proceedings to administer his estate?

To which, objection was made by defendant's counsel and said objection was sustained to which ruling of the court the plaintiff by counsel duly excepted.

10. And thereupon it was agreed by court and counsel on both sides that if Percy Woodward were examined the same questions would be propounded to him as were propounded to the witnesses Edmonston and McKee, the same objections would be made and sustaining of objections and exceptions thereto would be duly taken and it was further agreed that this was to stand as if the witness had actually been produced, questions asked and exceptions taken as in the case of Edmonston and McKee.

11. And thereupon the defendant Shoemaker who identified the following draft as that which paid the one thousand dollars ($1000) receipted for in the contract and is the draft he received from McLachlen and Company upon the order of Eugene M. Farr as
44 noted and receipted for on the contract aforesaid, which draft is in the words and figures following:

"$999.00. No. 42574.

"Bank of Charles Town,
Charles Town, W. Va.,
August 24, 1907.

Pay to the order of McLachlen Real Estate and Loan Co., $999.00 Nine hundred and ninety-nine dollars.

To Drovers' & Mechanics' Bank, Baltimore, Md.
G. A. PORTERFIELD, *Cashier.*"

His endorsement thereon was a genuine endorsement and he received the proceeds thereof.

And the foregoing being all the evidence introduced in behalf of the plaintiff and the plaintiff therein resting, and the defendant by his counsel offering no evidence in his own behalf and in opposition to foregoing, did thereupon move the court to direct a verdict for him, the defendant, in the case, on the ground that there had been no showing of any inability to convey title nor any affirmative evidence whatever that Mathews left any debts whatever as could be a lien on this property and that the possibility of debts was a mere possibility and speculative.

And the court thereupon granted said motion and instructed the said jury to return a verdict for the defendant, to which action of the court, in granting said motion, the plaintiff by counsel, then and there duly excepted and to which instruction by the court to the jury plaintiff also then and there duly excepted.

And thereupon and before the jury considered of its verdict the defendant, by his counsel, moved the court to sign this, his bill of exceptions, to have the same force and effect as to each exception as though the same were set forth in a separate bill, which is
45 accordingly done, now for then, this 20th day of June, A. D. 1910.

DAN THEW WRIGHT, *Justice.*

WASHINGTON, D. C., *May* 31, 1910.

SIR: The foregoing bill of exceptions, whereof a copy is this day served upon you will be submitted for settlement to Mr. Justice Wright, holding Circuit Court No. 2, on Friday, June 10, 1910, at ten (10) o'clock A. M. or as soon thereafter as counsel can be heard; whereof take notice.

Respectfully,

MORGAN H. BEACH,
Attorney for Plaintiff.

To Wilton J. Lambert, Esq-re, Attorney for Def't:

Service of copy of this bill and notice accepted this 31st day of May, 1910.

WILTON J. LAMBERT,
Att'y for Def't.

Y.

46 *Appellant's Directions for Preparation of Transcript of Record.*

Filed Jul- 30, 1910.

* * * * * * *

To the Clerk:

The plaintiff designates the following to be incorporated in the transcript of the record for the Court of Appeals.

1. Declaration and particulars of demand, omitting affidavit.
2. Pleas of defendant filed April 3rd, 1908.
3. Plea of defendant filed March 22nd, 1909.
4. Joinder.
5. Memo. of Verdict.
6. Entry of order overruling motion for new trial, judgment and noting appeal in open court.
7. Memo. of approval and filing of appeal bond.
8. Memo. of extension of time for filing bill of exceptions.
9. Memo. of submission of bill of exceptions.

10. Memo. of extending time for filing transcript of record until August 15th, 1910.
11. Bill of Exceptions.
12. This notice.

MORGAN H. BEACH,
Plaintiff's Attorney.

To Wilton J. Lambert, Esq., Defendant's Attorney:

SIR: Please take notice that I have designated above the
47 parts of the record which I desire included in the transcript.
Respectfully,

MORGAN H. BEACH.

Memorandum.

August 4, 1910.—Time for filing transcript of record in the Court of Appeals extended until the 15th day of September, 1910.

48 *Affidavit of Defense.*

Filed December 2, 1908.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Louis P. Shoemaker, being first duly sworn, on oath deposes and says, that he is the defendant named in the above entitled cause; that he has a good defense to the whole of the cause of action set forth in the declaration and affidavit of the plaintiff in said cause, which said defense is as follows:

He denies that he was without authority to make the agreement set forth in the affidavit of the plaintiff, on behalf of the owners of the real estate mentioned in said contract, but avers the fact to be that he had the approval and consent of the owners of the said real estate to make the said contract of sale; that said property was only a portion of considerable real property left by Alexander F. Mathews, deceased, in the District of Columbia and comprised in his estate; that deceased left a widow and several children, all of whom were over twenty-one years of age and competent to act for themselves; that all of said parties approved said agreement and proposed sale and fully authorized and directed defendant to act for them; he denies that there was any incumbrance on said property, and he denies that he was acting exclusively for the Mathews estate and had no authority to make said contract, but alleges the fact to be that he did have authority from all the owners of
49 said property to make said contract and did have their consent and approval to said contract. That under and by virtue of the terms of said contract, the said Eugene M. Farr, the assignor of the said plaintiff, and the person who entered into said contract, agreed to complete the sale of said real estate as follows:

"$10,000. in cash (of which the $500. now paid shall be a part), at the time of the delivery of the deed and giving of the deed of trust, which shall be within thirty or sixty days from this date; if it has not been done within thirty days a further deposit of $500. shall be made, and the balance of the cash payment shall be paid, and the deed of trust given in any event within sixty days from this date, and the entire transaction closed as herein stipulated."

That defendant was ready and willing to deliver a deed of said real estate from the owners of the fee thereof to the said Farr or his assignees of said contract, within the sixty days mentioned in said clause of said contract from the date of said contract, which by agreement had been changed from August 9th, 1907, to August 24th, 1907; that he notified said plaintiff, assignee to that effect; and requested of him information as to the name of the grantee in the proposed deed to be made in pursuance of said contract, within the sixty days, and that the owners of said property for whom defendant was acting when said contract was made, were ready and willing to execute and deliver the deed as agreed in said
50 clause of said contract, and this defendant offered to deliver a deed on their behalf; but that the said plaintiff refused to make the necessary payment as a condition precedent to receiving said deed, as agreed in said contract, namely, $9,000., (the said $1,000) paid by the said Farr, according to the provisions of said contract being agreed to be credited upon said payment), within the sixty days as provided by said contract; that the said plaintiff not only did not comply with his part of the said contract, as aforesaid, but has not since said time offered to or complied with the said provisions of said contract with reference to payment of said $10,000.

Defendant further says that there is contained in the said contract the following provision: "Failure on the part of the said Eugene M. Farr, to comply as herein stated, within said time, shall cause a forfeiture of the said sum or sums, and they shall be retained by me as an agreed liquidation of damages, and this proposed sale shall be off and receipt void: time being hereby made of the essence of this agreement"; that in pursuance of said provision in said contract the rights under the said contract of the said Eugene M. Farr, and the said plaintiff as his assignee, because of their noncompliance with the terms of said contract, have ceased and determined, and the said sum of one thousand dollars ($1,000) paid under said contract was properly declared forfeited as liquidated damages.

Defendant further denies that he was not in a position to deliver a deed of said property free from any incumbrance, as contracted to be done by him under said contract, and denies that be-
51 cause no administration of the estate of the said Alexander F. Mathews, deceased, had been had within the District of Columbia, that any debts of the said deceased would constitute an incumbrance upon said property, and thereby render it impossible for him to comply with his part of said contract; he alleges the true facts to be that administration had been had upon the estate of the said Mathews, in Lewisburg, West Virginia, and that the estate of

said deceased was in a position to pay, and he is advised and avers, had already paid, all debts of the said deceased whether in the District of Columbia or elswhere, out of the personal estate of said deceased, which was many times greater than necessary, he is advised, to cover and pay off the debts of the said deceased in the District of Columbia and elsewhere. Defendant further says that he has no knowledge of, nor does he believe there are, any debts owing by the Mathews estate in this District, and that said estate and the owners of the fee of this property had and have double the value of said property in real estate in said District of Columbia. Defendant further says that he was at all times ready and willing to carry out the provisions of said contract on his part to be performed, as were the owners aforesaid, but that the said plaintiff neglected and refused to perform the provisions of said contract to be performed by him; and that he is not indebted to the said plaintiff in the sum of one thousand dollars ($1,000), or any other sum whatsoever; and said defendant further says that the said plaintiff stated to him fully ten days before the expiration of the time limit in said contract that he had been unable to secure a purchaser for
52 said property, and that because of this fact he was unable to comply; that he was not purchasing said property for himself nor for his own account, but that he put up said deposit because he expected to sell to another party.

LOUIS P. SHOEMAKER.

Subscribed and sworn to before me this 1st day of December, A. D. 1908.

[SEAL.] WALTER S. T. BROWN,
Notary Public, D. C.

Appellee's Designation for Record.

Filed August 4, 1910.

* * * * * * *

To the Clerk:

The defendant designates the following to be included in the transcript of record to the Court of Appeals.

Affidavit of defense.

WILTON J. LAMBERT,
Attorney for Defendant.

53 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 52, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50331, at Law, wherein Adrian G. Wynkoop is Plaintiff and Louis P. Shoemaker is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of September, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on Cover: District of Columbia Supreme Court. No. 2221. Adrian G. Wynkoop, Appellant, vs. Louis P. Shoemaker. Court of Appeals District of Columbia. Filed Sep. 14, 1910. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia.

APRIL TERM, 1911.

No. 2221.

ADRIAN G. WYNKOOP, APPELLANT,

vs.

LEWIS P. SHOEMAKER, APPELLEE.

BRIEF FOR APPELLANT.

MORGAN H. BEACH,
For Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C

Court of Appeals, District of Columbia.

APRIL TERM, 1911.

No. 2221.

ADRIAN G. WYNKOOP, APPELLANT,

vs.

LEWIS P. SHOEMAKER, APPELLEE.

BRIEF FOR APPELLANT.

This was an action at law by Adrian G. Wynkoop, plaintiff, against Louis P. Shoemaker, defendant, to recover a deposit of one thousand dollars.

At the close of the plaintiff's case the court instructed the jury to return a verdict for the defendant, without any evidence being offered for the latter, and the case is here on appeal from such ruling and for other alleged erroneous rulings of the lower court in the course of the trial.

The entire evidence is set forth in the bill of exceptions, from which appear, in substance, the following material

Facts.

Alexander F. Mathews, a resident of Lewisburg, West Virginia, died in December, 1906. Surviving him were a widow, three sons, two of them married, and an unmarried

daughter, all of age and alive at the time of the trial and of the transaction there inquired into (R., p. 23).

He left a holographic will, which was probated in Greenbrier county, West Virginia, January 7, 1907 (R., pp. 6, 7, 8).

He appointed his three sons executors; gave them power to sell his real estate for the payment of his debts or for the division of his property; he directed that no security be required of them on their bonds, that there should not be any inventory or appraisement of his estate, and that there should be no sale thereof, except such sales as his executors were authorized and empowered to make.

He authorized them to execute any deeds necessary in sales made by them, "without having to invoke the aid of any court to that end" (R., p. 6).

He died seized of a tract of land in the District of Columbia called the Enoch Moreland tract, containing some sixty acres, which was the real estate described in the controversy at bar.

Wynkoop, the plaintiff, was a real-estate agent and attorney in Charles Town, W. Va.

August 23, 1907, he met for the first time Eugene M. Farr in Washington, D. C. Farr had in his office a copy of a contract, dated August 9, 1907, with Shoemaker, the defendant, which he gave the plaintiff, together with a written assignment thereof, and early the next morning introduced the plaintiff to the defendant at the latter's office (R., p. 14).

At this meeting Farr told the defendant that the plaintiff desired that $1,000.00 be paid him on the contract, and asked Shoemaker to phone to McLachlen & Co., local bankers, to satisfy himself that the payment would be made (R., p. 12). This Shoemaker did, and McLachlen & Co. phoned back that it had been O. K.'d at Charles Town by the bank, and that the money would be paid. The assignment from Farr to plaintiff was seen and approved by the defendant (R., p. 12). It purported, in consideration of $10.00, to

assign all Farr's interest "in and to a certain contract dated August 9, 1907, by and between myself (Farr) and Louis P. Shoemaker, *approved by the owners*," for the purchase of the Mathews tract (R., p. 11). Shoemaker made two changes in the contract after communicating with the Mathews executors, and before delivering it to the plaintiff, which appear at the top and foot of the first page of the contract. These were a change of date from August 9, 1907, to August 24, 1907, and a receipt for an order from Farr for the payment of one thousand dollars (R., pp. 8, 9). This came from the plaintiff (R., p. 12), and on Farr's order Shoemaker obtained and cashed a draft from the Charles Town, W. Va., bank, dated August 24, 1907, on Baltimore (R., p. 24).

Both of these endorsements were signed in the presence of the plaintiff by Shoemaker and Farr (R., p. 12).

The assignment from Farr to plaintiff was attached to the contract thus altered by Shoemaker, and delivered by him to the plaintiff (R., p. 12). Defendant told plaintiff at the time "this contract which I have given you here, has been very skillfully prepared by one of the ablest lawyers in the city of Washington. It means exactly what it says; it is signed by the executors of Judge Mathews' estate and by myself, and if for any reason at the end of sixty days a good deed cannot be made to you, I will pay you your money back" (R., p. 12). On the contract appeared the following endorsement:

> "We, the undersigned representatives of the estate of Alexander F. Mathews, do hereby consent to and approve of the provisions in the above receipt signed by our agent Louis P. Shoemaker. Given under our hands and seals this 13 day of August, 1907.
>
> MASON MATHEWS, *Ex'c'r.* [SEAL.]
> C. G. MATHEWS, *Ex'c'r.* [SEAL.]
> HENRY A. MATHEWS, *Ex'c'r.* [SEAL.]"
>
> **(R., p. 11).**

The plaintiff then returned to his home and sought to put the property on the market and to interest other agents in it. He within the sixty days, and on the sixtieth day, demanded the return of his money from the defendant on the ground that a deed could not be made within the time limited, having filed a written memorandum of his objections with Shoemaker (R., p. 12).

One Beall had offered plaintiff an advance of $4,000.00 over the contract price with Shoemaker, but had written him a letter about the title which surprised him.

The substance of plaintiff's objections was that proceedings in court would be necessary to make title under the Mathews will, which would consume time, and that the title company would certify that the property would be subject to the debts of the estate which would be unsatisfactory to the average buyer (R., pp. 12-13). These objections Shoemaker answered in a letter of October 21, 1907, written from Washington and addressed to the plaintiff at Charles Town, West Virginia. His contention was that assuming the will had but two witnesses, it was sufficient to pass title; if not, the Mathews heirs were adults, ready and willing to convey; that Mathews was a wealthy man, owning much real estate, and the part of it in the District of Columbia was unencumbered; that by giving bond, the title company would issue a guarantee certificate, or that he, Shoemaker, could obtain, in a short time, a decree of court for conveyance free from encumbrance; that there would be no difficulty in giving a good title, free from encumbrance, and he formally notified plaintiff to comply with his contract (R., p. 19).

On the last day of the option, October 24, 1907, plaintiff came to Washington with his counsel, Mr. Brown, and the two called upon Shoemaker. Mr. Brown informed Shoemaker that the Mathews will was holographic, that such a will could not be probated in the District of Columbia, so as to pass title to real estate; that there should be an administration of the estate of the deceased in the District of Columbia,

to protect a purchaser of real estate, and that the title contracted for was not such as would be marketable from the information Mr. Brown had received. He then asked Shoemaker to refund the money to the plaintiff. Shoemaker expressed surprise at the condition of affairs, and seemed to be unadvised as to the character of the Mathews will, and also as to whether it could be probated or not; he said he represented the executors of the Mathews' executors, and that he could not refund the money without conferring with them, or take any action in the matter. Later on, the same day, Mr. Wilton J. Lambert, Shoemaker's attorney, was called in and the matter discussed, and while Mr. Lambert did not know whether Mr. Mathews left a will or what the condition of the estate was, he was of the opinion that a partition or equity proceeding could be consummated in a short time. Shoemaker declined to return the money to Wynkoop (R., p. 22). Wynkoop made no tender of the purchase price or of further compliance.

To show the death of Mr. Mathews and the devolution of title and the owners of the property described in the contract, and to show the necessity for equity proceedings to effect the sale, and the time necessarily consumed thereby, plaintiff offered in evidence the record of Equity Cause No. 27496, in the Supreme Court of the District of Columbia, wherein Henry A. Mathews, Laura G. Mathews, Mason Mathews, and Jane M. Mathews, his wife, were complainants, represented by Wilton J. Lambert, as attorney, and Charles G. Mathews and Harriet B. Mathews, his wife, and Eliza P. Mathews, were defendants, being a suit between the heirs at law and widow of Alexander F. Mathews, deceased, instituted December 2, 1907, for the partition by sale of the real estate in the District of Columbia, whereof he died seized among his heirs at law, and of which the property described in the contract in evidence was a part, and an offer to purchase which was made by the defendant Shoemaker in said cause and was accepted by a decree entered therein April 24.

1908, to which the defendant by counsel objected, whereupon the following occurred:

> "The COURT: Was the plaintiff a party to that proceeding?
> "Mr. BEACH: No.
> "COURT: The objection is sustained."

To which ruling of the court, plaintiff by counsel then and there duly excepted (R., p. 21).

The plaintiff's direct examination is in a page and a half of the record (R., pp. 12-13); his cross-examination was lengthy, covering pages 13, 14, 15, 16, 17, 18, and part of page 19.

On his direct examination he told of the meeting with Farr, and with Shoemaker on the following day, his ineffectual attempt to dispose of the property and his demand for the return of his money (R., pp. 12-13).

On cross-examination he was asked, in great detail, about this, and after saying that he did not have the money to pay the whole purchase price of $48,000.00 for the property and that he expected the aid of others in carrying the deal through, he was thus interrogated (R., p. 14):

> "Question by Mr. LAMBERT: Where are those people located that you said were expecting to take the proposition up?
> "Mr. BEACH: I object as not responsive to the direct examination, and not material to any issue.
> "COURT: The objection is overruled.
> "Mr. BEACH: I note an exception.
> "Thereupon the witness answered and continued to testify in the cross-examination as follows:
> "Stallings who lives here in Washington, he was one of them and Farr was another of them and Davenport was the other of them. None of them live in Baltimore.
> "Whereupon the following occurred:
> "Question by Mr. LAMBERT: None of them lived in Baltimore? Did you not have an arrangement to

make a deal or sale of this property to some Baltimore people?

"Mr. BEACH: I object on the same grounds.

"COURT: The objection is overruled.

"Mr. BEACH: The same exception."

Thereupon the witness proceeded to testify as to dealing with one Bealmer in Baltimore, in the course of which he identified a letter as written by himself to the defendant, dated October 25, 1907, which the defendant's counsel, still cross-examining, offered in evidence, to which the plaintiff objected; and in support of such offer the defendant's counsel said that his object was to show the plaintiff had "no object in this matter, except to try to make a profit in dealing with other parties in Baltimore in reference to the proposition, and that they failed to materialize, or come to the point, and therefore he simply over his own signature confessed that to be the situation, and there was nothing about the title at all" (R., p. 16).

The court over the objection of the plaintiff allowed the letter to be read in evidence.

Shoemaker's reply of October 26, 1907, to this letter was then identified by plaintiff, still under cross-examination, and admitted in evidence over plaintiff's objection (R., p. 18).

On redirect, three letters from plaintiff to defendant, which, it was admitted, had been by him received, were offered in evidence dated respectively October 26, 28, and 30, for the purpose of showing there had been no request for any extension of time or any waiver of plaintiff's right to a return of the deposit, and to rebut the contention of defendant's counsel in offering the letter of October 25, 1907; but they were all excluded by the court (R., pp. 19-20-21).

The contract (R., p. 10) provided that the title should be examined by some one of the Washington title companies. Various officials of those companies, to wit, William E. Edmonston, Frederick McKee, and Percy Woodward, were called by the plaintiff, and substantially the question put to

them whether they or their companies would pass as good and unencumbered such a title as was involved in the case at bar; but the court upon objection by the defendant refused to allow their answers to be taken (R., pp. 23, 27).

Assignment of Error.

The lower court erred:

1. In directing a verdict for defendant (R., p. 24).

2. In excluding the record of the equity cause (R., p. 21).

3. In permitting the cross-examination of the plaintiff as to the parties he expected to join with him in the transaction (R., p. 14).

4. In permitting the cross-examination of the plaintiff as to his dealing with the Baltimore party, Bealmer (R., p. 14)

5. In admitting in evidence the plaintiff's letter to the defendant of October 25, 1907, and the defendant's answer of October 26, 1907 (R., pp. 16, 18).

6. In excluding plaintiff's letters of October 26, 28, and 30, 1907, to the defendant, offered in his redirect examination (R., pp. 19-20-21).

The first assignment is chiefly relied upon; the remaining assignments are discussed in connection therewith; though not treated separately, they are not to be deemed abandoned.

Law.

The grounds of the motion, which the court granted, to take the case from the jury were "that there had been no showing of any inability to convey title nor any affirmative

evidence whatever that Mathews left any debts whatever as could be a lien on this property, and the possibility of debts was a mere possibility and speculative" (R., p. 24).

In considering this ruling, and the other points saved at the trial and assigned as errors here, certain well-settled principles may be borne in mind. One is that an agent to sell real estate in the District of Columbia has no authority, under his general employment, to bind the owner by a contract or option for sale.

Mannix *vs.* Hildreth, 2 App., 259.
Jones *vs.* Holladay, 2 App., 279.
Block *vs.* Ryan, 4 App., 283.

He is limited to finding a purchaser and reporting his offer.

Also it may be assumed that a mere offer, until accepted, constitutes no contract, and where no time is specially limited for acceptance, the offer must be accepted within a time which is reasonable under all the circumstances of the case.

9 Cyc., Title, Contracts, pp. 265-266.

A holographic will is of no effect in the District of Columbia, and powers of sale of real estate, therein situate, given to executors thereby appointed cannot be exercised in this jurisdiction.

D. C. Code, section 1626. Form of Will.

Where a decedent not domiciled in the District of Columbia leaves realty here, so much of it as is necessary to pay and discharge just claims against him by creditors and persons here domiciled, shall be administered by the probate court *without regard to his personal estate at the place of his domicile or elsewhere*, provided such claims be prosecuted within one year from his death.

D. C. Code, section 260. Lien of Creditors.

Full authority is given the probate court to administer such realty by sales through the personal representatives and their bonds are responsible for the proceeds of such sales made under the court's order; such sales shall not be made unless necessary to pay debts and legacies, nor until the auditor shall ascertain and report the debts or legacies, the deficiency of personal assets and the real estate necessary to be sold for the payment of debts and legacies.

D. C. Code, section 146. Sale of Real Estate.

Any person interested in the estate, however, may prevent such sale by giving bond to pay all debts or legacies.

D. C. Code, section 147.

A period not exceeding two years between the death and the granting of letters shall not be computed in the limitation of claims against a decedent's estate.

D. C. Code, 1266.

ARGUMENT.

There was evidence tending to show that the paper writing of August 7, 1907, had not been approved by the owners. The court excluded evidence tending to show that the title companies, whose decision was, by the express terms imposed by Shoemaker, to control, would not have passed the title as good and free from encumbrance so as to be marketable. The court excluded evidence tending to show that judicial proceedings, to which the defendant in this action was a party, were had to pass title.

The contention of the plaintiff was that the deposit should have been returned to him, because there was lacking the approval of the owners, which was a condition precedent to its being even considered as a deposit, and because, further, the title was not good and free from encumbrance, and could not be made so without judicial proceedings.

If the paper of August 7, 1907, be examined, it will appear that on that date it was a mere offer, unaccompanied by any deposit, although it purported, in fact, to be in receipt of $500.00. This indisputably appears from the endorsement thereon of August 24, 1907.

The fact that Shoemaker signed as agent for the Mathews estate, the expressions in the paper "subject to the approval of the owners," "those whom I represent," "the present owners," "the parties who own the land hereby contracted to be sold," show that he neither deals nor professes to deal with his own property, or that he assumes any personal liability. He does, indeed, provide that he himself shall have the deposit as his own, if it be forfeited, but this is the self-interest of an agent seeking commissions. The same motive explains the provision that if the sale be effected he shall name the trustees and shall himself prepare and be paid for all deeds of partial release at a price of "five dollars and the notary fees."

Recognizing expressly in his receipt that he cannot by contract bind his principal without the latter's approval, he procures the written endorsement of the Mathews executors appearing on the paper.

That they considered themselves empowered under their father's will to contract to sell and convey his real estate is most probable.

That they were regarded as the owners by Shoemaker is equally certain; he obtained their written approval; he communicated with them in the plaintiff's presence as to altering the date and accepting the order for $1,000.00 at the first interview with Farr and the plaintiff; he specially called plaintiff's attention to their written approval; he uniformly declined to return the deposit without their permission; he stated to the witness Brown, on the day the option is expiring, that he represented the executors.

Dealing, at the outset, as the agent of unnamed principals, making terms which were not and could not be bind-

ing until approved by them, he procured and exhibited the written authority of these executors under seal, and claimed throughout to represent them and none other.

The plaintiff took an assignment of a contract "approved by the owners" and the defendant delivered a contract approved by the executors, who, he said, were his principals. But instead of the plaintiff having a contract with the owners, he got one with those who had no more power to contract than the agent himself.

The executors could have defeated any attempt to specifically enforce the contract by simply showing they signed as executors.

Shoemaker could have been in no way liable under the contract to convey, since it was not his own contract, but simply that of his principals who, he mistakenly supposed, were the owners.

True it is that, in his letter to the plaintiff of October 21, 1907, he, in answer to the plaintiff's written memorandum of objections to title, says, among other things, that if a title cannot be made under the will, all the Mathews heirs were competent and ready to sign a deed if the plaintiff would comply with his contract.

But while the letter was evidence as to when plaintiff's objections were made, about which there was some uncertainty, the statements of fact which were self-serving for the writer were not evidence of the existence of such facts. Or, if they were, it was for the jury to find those facts, in view of all the testimony, including that of the plaintiff's apparent ignorance that the Mathews will was holographic, as exhibited in the interview with Brown, on the last day of the option.

Until the owners approved, there was no contract; *a fortiori,* there could be no damages or forfeiture for breach until there was a contract to be broken.

If the owners did not approve, the deposit was returnable.

If some of them did and others did not, it must have gone back to the depositor or his assignee.

If they neither approved nor disapproved, *e. g.*, if the offer was never reported to them, the same result must have followed.

Before, therefore, considering rights under the contract, there was first to be considered whether there was a contract.

The deposit was initially earnest money, accompanying an offer; until that offer was accepted it remained a deposit and could not be considered either as part payment or forfeit money. It was the property of the depositor, subject to become a partial payment or to be forfeited or to be returned to him, as the event might prove.

Was the title good and free from encumbrance? The criterion of this was the judgment of some one of the local companies. The plaintiff had objected in writing to the defendant, that they would only certify the title subject to the debts of the estate; and that before a good title could be had the heirs would have to institute proceedings in the local court. Officials of the various title companies were asked, in substance, whether they or their companies would pass such a title as that in the case at bar, but were not allowed to answer; and the record of proceedings to effect a sale of the very land involved to the defendant, who was a party to such proceedings, was likewise rejected by the court.

If it were true that such companies, assuming the regularity of the record title, would only certify that the property would be subject to the debts of the estate, and if, by the local law. it were so subject for one year after the death of the decedent, irrespective of however much personalty there might be at the place of his domicile or elsewhere, and when no inventory or appraisement were required, a conveyance, with special warranty from the executors of one who has been dead but a few months, or even from his heirs at law, would, as

the plaintiff claimed, be unsatisfactory to the average buyer. If, technically, the title were good, according to the record, and if no recorded lien by judgment or trust deed were actually shown, still the potential quasi-lien, assertable within a year from the death of the owner, would encumber the title so as not be one which could be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. And where, as in the case at bar, there was no way of ascertaining what just claims were outstanding against the decedent, and no protection afforded against them by general covenants, it was no such title as a person of reasonable prudence and caution would either purchase or accept as security.

Assignments 3, 4, and 5 go to the attempt by cross-examining the plaintiff to show that he failed to purchase because he could not sell to others who had disappointed him and not by reason of any defect in the title. Were this so, there was still no obligation on him to comply, or any right to forfeit the deposit, if there had been no approval by the owners or if the rule, within the meaning of the contract, was not good and free from incumbrance.

Assignment 6 is to the court's exclusion of letters from the plaintiff to the defendant, which were a part of or in connection with those of the defendant to the plaintiff, which had been admitted over objection.

The excluded letters were offered to show that the plaintiff had waived no right to the return of the deposit and had asked no extension of time under the contract.

It is submitted that the judgment below should be reversed.

MORGAN H. BEACH,
For Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 2221.

ADRIAN G. WYNKOOP, APPELLANT,

vs.

LOUIS P. SHOEMAKER.

BRIEF ON BEHALF OF APPELLEE.

WILTON J. LAMBERT,
RUDOLPH H. YEATMAN,
Attorneys for Appellee.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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BRIEF ON BEHALF OF APPELLEE.

ARGUMENT.

In December, 1906, one Alexander Mathews died at his home in Lewisburg, W. Va., leaving him surviving a widow, Laura A. Mathews, three sons, Mason M. Mathews, Charles G. Mathews (both of whom are married), and Henry A. Mathews, unmarried, and a daughter, Eliza P. Mathews, unmarried, all of whom were of age on August 1, 1907, and capable of executing a valid deed or contract (Rec., p. 23). At the time of his death Mathews was seized and possessed in fee of a tract of about sixty acres of land fronting on Rock Creek Road known and to be hereinafter designated as the "Enoch Moreland tract." Mathews had executed a holographic will, valid under the laws of the State of West Virginia, his domicile, and duly proved and admitted to record as his last will and testament by the county court for the county of Greenbrier, W. Va. (Rec., p. 7), in and by which he appointed his three sons, Mason, Charles G. and Henry

A. Mathews, executors with authority to makes sales of his property as they deemed expedient, and to execute any and all deeds, contracts or other papers necessary and proper to perfect the sales without invoking the aid of any court, and in and by which he further directed that his whole estate be disposed of and distributed in accordance with the statutes of the State of West Virginia as then in force concerning and regulating the disposition and distribution of the estates of decedents who died intestate (Rec. p. 6). This will was never offered for probate and record in this District because the provisions of our law in reference to witnesses to wills were not complied with.

August 9, 1907, the appellee, Louis P. Shoemaker, and one Eugene M. Farr executed the contract of sale of the Enoch Moreland tract, set forth in full in the record (pp. 9, 10, 11). August 13, 1907, a notation at the bottom of the contract was signed by the three sons as "representatives of the estate of Alexander F. Mathews," approving the provisions of the contract (Rec., p. 11). August 24, 1907, there was endorsed on the contract at the top of page one, at the request of the appellant, Wynkoop, to whom the contract was assigned (Rec., p. 11), a memorandum signed by the respective parties, changing the date thereof to August 24, 1907, "because of unavoidable delay in making the deposit" (Rec., p. 8). On the same day (Rec., p. 12) a memorandum at the bottom of page one of the contract was signed by the respective parties, showing the receipt by Shoemaker of an order of Farr for $1,000, to be paid Monday, August 26, 1907, as the deposit required by the contract (Rec., p. 9). This order was paid (Rec., p. 24). As a result of these transactions, subsequent to the execution of the original contract, the vendee or his assigns were allowed sixty days from August 24, 1907, within which to comply with the terms of the sale.

August 23, 1907, Farr executed an assignment of all his right, title, and interest in the contract with Shoemaker to the appellant, A. G. Wynkoop (Rec., p. 11), which was attached to the contract and brought to the notice of the appellee, Shoemaker, August 24, 1907, in the latter's office.

At or about October 21, 1907, several days before the expiration of the time for the compliance with the terms of the contract, to wit, October 24, 1907, Wynkoop, desiring to withdraw from the transaction and to receive back his deposit of $1,000 called at the office of Shoemaker and demanded the return of his money, and served on the latter a paper as stating the grounds of his objection to the title to the property, namely, that it was necessary "to have the regular court proceedings in the District instituted by the heirs in order to complete the record by reason of the death of Capt. Mathews" as the property would be subject to the debts of the estate (Rec., pp. 12, 13). It would appear from the record that this was the first intimation that came to Shoemaker that Wynkoop did not desire to complete his purchase. Thereupon, and on October 21, 1907, Shoemaker wrote a letter to Wynkoop to disabuse his mind of the erroneous impression that he could not deliver a good and sufficient title, in which he stated:

> "Even if the will itself is not sufficient for this purpose [that is, to pass real estate in the District] all the heirs of Mr. Alexander F. Mathews are adults, competent to sign a deed and ready to do so, upon the compliance with the provisions of the contract made with Mr. Farr, and assigned as I have been advised by you. With reference to the other point which was made in a typewritten paper which you left with me, and not signed by anyone, I would say that Mr. Mathews was a wealthy man and owned a great deal of real estate, all of it, so far as the District of Columbia is concerned, was unincumbered, and I believe

> all formal matters connected with administration have been attended to at the place of his last domicile. In addition, were it necessary, I am sure there would be no difficulty in giving a bond to indemnify the title company, and secure a guarantee certificate of title which is sometimes issued by the Title Companies, or I can go into the court by a very short proceeding and the court will direct the conveyance to be made to you or to any person entitled to it, free from any incumbrance; in other words, there is no difficulty in giving you a deed conveying a good title to the property free from incumbrance, if you are prepared to comply with your part of the contract, and it is my purpose by this letter to give you notice of this fact and request that you will promptly advise me in whose name you desire the deed to be made" (Rec., pp. 18, 19).

It will thus be seen that to meet any fancied objections of Wynkoop, put forward to obtain back his deposit, Shoemaker notified and assured him, immediately upon his attention being called to the matter, that he could and would fulfill his part of the contract.

Wynkoop never advised Shoemaker to whom the deed was to be made; he did not want any deed; he did not tender the $10,000 to be paid in cash within the specified sixty days (Rec., p. 19), and it is undisputed that he made no attempt to comply with the requirements of the contract by him to be performed, but was contented to rely on his alleged right to receive back his deposit, notwithstanding that provision in the contract which reads (Rec., p. 9):

> "Failure on the part of the said Eugene M. Farr, to comply as herein stated, within said time, shall cause a forfeiture of the said sum or sums, and they shall be retained by me as an agreed liquidation of damages, and this proposed sale shall be off and receipt void; time being hereby made of the essence of this agreement."

In his declaration describing his cause of action, Wynkoop sets forth the contract with its various changes, and the assignment to him, and seeks to recover on the allegations that Shoemaker did not on August 24, 1907, or within sixty days thereafter, have the consent or approval of the owners of the property to the terms of the contract of sale, nor was the property free from incumbrance within said time.

First Assignment of Error.

Did the court below err in directing a verdict for the appellee, defendant?

Two grounds are urged by appellant, on either of which, it is claimed, appellant would be entitled to recover the deposit made by him, namely (1), that the contract provided that it be subject to the approval of the owner or owners of the property, and that such approval was not had; and (2) that the property was not free from incumbrance as contracted for in the contract.

The contract sued on herein was entered into between Shoemaker, individually, it being elementary law that the phrase following his signature to the contract, "ag't. for Mathews' est." is *descriptio personæ*. The contract also reads "which tract of land I have contracted to sell, and do hereby contract to sell, subject to the approval of the owner;" failure on the part of Farr works a forfeiture, and the deposit "shall be retained by me" (Rec., p. 9).

The fundamental objection to a consideration of this case by a jury was the neglect, on the part of the appellant, to prove a tender of performance on his part, the covenants of the contract being dependent. Such proof can be dispensed with only after *proof* that tender would be fruitless because of supposed inability of Shoemaker to make his part of the contract.

The burden was upon Wynkoop to prove his case, although it is founded upon these negative allegations, namely, the alleged want of approval of the owners of the property, and the assertions that the property was not free from incumbrance.

We will consider each objection in the order named.

I.

Was There any Evidence of Want of Approval by the Owners, as Alleged?

The record discloses that the owners of the Enoch Moreland tract were the heirs at law of Judge Mathews, with a dower estate in the latter's widow. There is no evidence in this record of this case tending to show that these owners did not approve the terms of the contract, as alleged in the declaration and as appellant was bound to offer, unless it could be said that the mere appearance on the contract of a form of approval signed by three of the owners only, purporting to act as executors, evidences a disapproval or want of approval by the owners. Indeed, it would appear that it was understood by the parties that the contract was approved, and that understanding must have been acted upon by Wynkoop until, when groping about for an excuse to recover the money that he had paid to tie up the disposition of this property for his personal advantage, he, for the first time, brings to the notice of the appellee any claim that there was not an approval of the contract, when he filed his declaration in this case. Appellant testified (Rec., pp. 12, 13) that when he first demanded his money back, he left with appellee a memorandum setting forth his reasons, in which he said that "before you could get a good title to this property it would be necessary to have the regular court proceedings in the District instituted by the heirs, in order to complete the record, by reason of the death of Capt. Mathews."

The contract provided for "the approval of the owner" (Rec., p. 9) and it is not required that such approval be in writing, or in any particular form, or noted on the contract itself. It follows that if the fact of approval existed that would be sufficient. It is to be noted that Wynkoop was notified, when he attempted to withdraw from this contract, that the approval of the owners had actually been had, by the letter of October 21, 1907, from Shoemaker, in which the latter stated that "all of the heirs of Mr. Alexander F. Mathews are adults, competent to sign and all are ready to do so, upon the compliance with the provisions of the contract," etc. (Rec., pp. 18, 19).

But until appellant has made a tender of performance on his part, he is precluded from coming into this court and recovering back his deposit on the alleged ground that there was a want of approval of the owners, whether the contract was a personal one between Shoemaker and appellant's assignor, or made for the owners by Shoemaker as agent unless there be affirmative proof that Shoemaker was absolutely unable to deliver the deed and further comply with the terms of the contract on his part to be performed or that the owners in fact had not given their approval to the contract unless there be a tender of performance by appellant. Neither the appellant nor the court can assume that the want of consent of the owners existed without any evidence on which to found the same, and especially in view of the express affirmation of Shoemaker that he had such consent, as set forth in the letter hereinabove quoted, which was sent to Wynkoop when he for the first time endeavored to withdraw from the contract. Were this contract not considered a personal one, but only the act of Shoemaker purporting to be the act of the agent of the owners, yet, it being appellant's position that he is entitled to recover because there is *no* contract, the burden was

upon him to so prove by offering evidence of the alleged want of approval of the owners. There was nothing to prevent the appellant from taking the depositions of the owners, if he sincerely believed that the contract had not their approval.

It must be conceded that no effort was made to introduce testimony showing that the respective parties, the heirs, wives, and widow would not, at the request of Shoemaker, and upon compliance by appellant with his part of the contract, join in a deed to appellant or whomsoever he would designate.

The agreements of the vendor and vendee in this contract of sale were dependent and subject to the rule, as stated by this court, that—

> ". . . if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and can not proceed against the other without an actual performance of the agreement on his part or a tender and refusal. And an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. Bank of Columbia *vs.* Hagner, 1 Peters, 465; Gazley *vs.* Price, 16 Johnson, 267; Northrop *vs.* Northrop, 6 Cowen, 296; 1 Sugden on Vendors, 305–6 (7th Amer. Ed.); Johnson *vs.* Weygant, 11 Wend., 48; Shinn *vs.* Roberts, 1 Spencer (N. J.), 435, in 43 Amer. Dec., 640."
>
> Newman *vs.* Baker, 10 App. D. C., 187–202.

What may be said to be exceptions to this statement of the law in suits by vendees are cases in which the vendor, as said by the Alabama court, "at the time appointed for making title" is unable "to make title as covenanted, under some circumstances," and "when per-

formance of a contract is impossible, or the party to be charged has disabled himself from performance."

Pate *vs.* McConnell, 106 Ala., 449–453.

To the same effect are—

Hartley *vs.* James, 50 N. Y., 38.
Ziehen *vs.* Smith, 148 N. Y., 448–560.

II.

Was the Property Free From Incumbrance?

The contract of sale provides that Shoemaker deliver a good title, free from incumbrance (Rec., p. 10). It is not disputed that the title of Judge Mathews in his lifetime was not only a good title, but a title good of record, and that that title descended to his children as heirs subject to the dower of his widow. It follows that there was no legal impediment preventing Shoemaker from delivering to Wynkoop a deed signed by the widow and the heirs, and the wives of those of the heirs who were married, passing a title that was both good in fact and of record.

It is claimed that because Captain Mathews died, and that his contract terminated within a year, a title free from incumbrance could not be given by Shoemaker. In other words, the contention is that although there is no proof in this record that one single claim exists in the District of Columbia against the estate of Alexander Mathews, deceased, the possibility in the future of claims being probated to be made liens upon this real estate constitutes a "potential quasi-lien" and an incumbrance in breach of the covenants in this contract; this in face of the utmost good faith expressed by the appellee, Shoemaker, in his letter dated October 21, 1907, to Wynkoop, after his attention was first called to this position of appellant, in which he tenders himself ready to give a

bond to indemnify the Title Company and secure a guarantee certificate of title or to take court proceedings in and by which a conveyance of title could be had free from any possible incumbrance (Rec., pp. 18–19).

There could have been no objection to the title had the appellant complied with the terms of the contract on his part to be performed and consent partition suit had with the appointment of trustees by this court to convey title and the proceeds of the sale reserved to meet any claims of possible creditors, although there is no proof that any creditors existed. A question similar to this one confronted the court in the case of McCaffrey *vs.* Little, 20 App. D. C., 123, in which a purchaser at a judicial sale objected that there was pending against the devisor of the claimants of the land a creditor's bill. It appearing that the amount of the debts were less than the purchase price, the objection was held to be insufficient as they could "readily be provided for without affecting the title of the purchaser."

The offer of Shoemaker to provide for a guarantee certificate from the Title Company provided a means for insuring to Wynkoop a title free from "potential" liens, and it is respectfully submitted, brought him within operation of the rule as expressed by the court in the case of Andrews *vs.* Word, 17 B. Mon. (Ky.), 518, that where a claim is contingent and of such a nature that the purchaser can be indemnified against all loss or damage that may accrue from it, and the vendor is willing to give such indemnity, the court will, under peculiar circumstances, and to effect the ends of justice, require the contract to be specifically executed, upon condition that such indemnity be given.

But, aside from this, it is respectfully submitted that the parties hereto are bound by the terms of their contract, which do not refer to potentialities, but to incum-

brances, things tangible, and substantial, and that by no reasonable interpretation of the word "incumbrances" could potential quasi-liens, as these possibilities, rather that probabilities are denominated by the appellant.

Even where there is a defect of title, if that can be removed in a particular case so as to give a good title upon compliance with the terms of sale by the vendee, tender is necessary.

In the case of Pate *vs.* McConnell, 106 Ala., 449, decided in 1894, it appears that one McConnell and others, the appellees, were sued by Pate and others, appellants, on a bond for title to a certain lot, to recover back $920 which they had paid to the appellees under the terms of the bond, the entire purchase price being $1,200, and in and by which bond it was covenanted that upon the payment of the purchase price for the lot, vendees would convey by a good sufficient deed in fee simple with general warranty, the lot purchased. Subsequent to the making of the payments aggregating $920, a suit was instituted by a third party against the appellees to foreclose a mortgage executed by appellees on the lots sold to appellants; in this suit a decree was rendered foreclosing the mortgage and under that decree the lot purchased by appellees was sold. The plaintiff's never demanded a deed, but it was testified that if the purchase money had been paid by appellants, appellees would have been able to give them a valid deed conveying a fee simple title to the lot. The lower court entered a judgment in favor of the appellees. In sustaining the action of the trial court, the appellate court says:

> "But it is quite an error to suppose, when parties stand in the relation of vendor and vendee of real estate, that under any and all circumstances, a mere defect in the title of the vendor, or a mere inability at the time appointed to make such title as he had promised or covenanted, will relieve the

vendee from the duty of tendering payment of the purchase money, and demanding a conveyance" (p. 453).

And again, the court says:

". . . It is probable, if not certain, that there was no period of time after the purchase money became due, during which, if the plaintiffs had tendered payment, the vendors could not have freed their title from its infirmity, and made the plaintiffs a good title conforming to the covenant.

. . . . . .

"It was immaterial that the plaintiffs were not formally notified of the readiness and ability of the vendors to perform. There was no duty resting on the vendors to give such notice—the duty was on the plaintiffs, and if they desired performance of the covenant, or if they intended to place the vendors in default for nonperformance, to tender performance of the act on which the obligation and duty of the vendors to perform depended" (p. 454).

Second Assignment of Error.

This assignment does not seem to be treated of in the argument in appellant's brief, the substance only of the objection being set forth in appellant's statement of facts. It is obvious from the statement of the purpose for which the papers in the equity suit were offered that same were inadmissible for the reasons (1) that Shoemaker was not a party to same; (2) they were not necessary to establish, nor the best evidence of, the death of Mr. Mathews and the devolution of title to the owners of the property described in the contract, and indeed direct evidence of these details was offered and received, and that matter conceded; and (3) they could not be offered as establishing the necessity for equity proceedings because that would be a question of law.

Third, Fourth, Fifth, and Sixth Assignments of Error.

The cross-examination complained of in the first three of these assignments was proper as bringing out all of the dealings between the parties, their motives and actions, and fully developing for the benefit of the court and jury the situation existing between the parties.

If it could be said that the cross-examination was improperly permitted, yet there would be no prejudicial error, as the real question involved and acted upon by the court was whether or not the grounds assigned by the appellant, namely, alleged want of approval by the owners and alleged defect of title, were established by the evidence.

The letters offered by appellant and excluded by the court embraced in the sixth assignment of error show on their face their immateriality.

It is therefore respectfully submitted that the court below did not err, and that its judgment should be affirmed.

Respectfully submitted.

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